



National Audubon Society
225 Varick Street, 7th Floor
New York, NY 10014

212.979.3196
www.audubon.org

Sent via email to srice@blm.gov

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Stephanie Rice, Project Lead
Alaska State Office
Bureau of Land Management (BLM)
222 West Seventh Avenue – Mailstop 13
Anchorage, Alaska 99513
srice@blm.gov

Re: Willow Master Development Plan Draft Supplemental Environmental Impact Statement

Dear Ms. Rice,

Please accept these comments pertaining to the Willow Master Development Plan on behalf of Audubon Alaska and the National Audubon Society (Audubon). Audubon is a science-based conservation organization that works to protect birds, other wildlife, and their habitats across Alaska and around the world. We have over 6,000 members in Alaska and have been committed to Alaska's wildlife and communities since our office opened in 1977. We represent Alaskans who live across our state and who have important connections to places like the Western Arctic. We also represent over 1.6 million members across the United States who care deeply about climate change and Alaska's globally important habitats. We use science to identify conservation priorities and support conservation actions and policies, with an emphasis on public lands and waters.

The Willow Master Development Plan, under any alternative, should not be permitted to move forward. The conservation, climate, and environmental justice impacts are too significant. If the government ultimately decides to approve this proposed development, however, significant actions must be taken to offset greenhouse gas emissions, durably protect large areas of high ecological and cultural significance, and conserve birds and wildlife.

We appreciate BLM's request for comments pertaining to mitigation measures.¹ The draft SEIS lacks significant and meaningful discussion on what the government should be doing to durably avoid important places and meaningfully offset the residual impacts of this proposed development. Below we offer some basic mitigation recommendations, grounded in existing regional and national policies, pertaining to the management of greenhouse gas emissions and to the protection of high value areas. We also note places the analysis and measures proposed in the Willow Master Development Plan and SEIS are inadequate, including with regard to protections for migratory birds.

¹ Willow MDP draft SEIS at page II.

I. BLM must evaluate and require effective mitigation

Mitigation is a widely accepted regulatory tool. Sound mitigation policy provides the BLM with a structured, rational, and transparent framework for meeting its multiple use and sustained yield mandate. When fairly designed and implemented and evaluated at appropriate scales, mitigation policies can reduce conflict between conservation and land use activities.

BLM has long included compensatory mitigation requirements in land use planning and management decisions.² Mitigation – avoidance, minimization and, where appropriate, compensatory mitigation – allows multiple uses to proceed while ensuring associated impacts are fully offset. Given BLM’s broad authorities to adopt and impose mitigation, the BLM must adopt, implement, and enforce well-designed mitigation in order to ensure the continued health of our public lands and the environment.

A. BLM should require, implement and enforce effective mitigation that meets standard principles.

If the BLM is to move forward with the Willow Master Development Plan, mitigation must be adopted and applied that meets a common set of defined principles and standards. This will be essential to ensure the project does not result in “unnecessary or undue degradation” of public lands. More specifically, mitigation must meet the standards and principles outlined in the BLM’s Mitigation Manual (1794-M) and Mitigation Handbook (H-1794-1).

Important features of standard mitigation policies include:

- Establish a mitigation goal: Sound mitigation policies are guided by a clear goal statement.
A goal of net conservation benefit is appropriate where mitigation must be relied upon to avoid unnecessary and undue degradation. Actions that offset species and habitat loss to a no net loss standard at best maintain the status quo.
It is critical that BLM have a high degree of confidence that direct, indirect, and cumulative impacts would be offset. This includes the need to offset habitat impacts with high quality, durable, timely, and additional compensatory mitigation projects.
- Loss/gain methodology: Mitigation programs should have in place loss/gain methodologies to quantify impacts and offsets. Habitat value must be quantified to establish that the mitigation goal pertaining to habitat has been met.
These methodologies should be based on a measure of the capacity of areas lost and offset. It is important to address any variation in the quality of habitat for the different species impacted by including measures of habitat functionality and using adjustment factors to account for the risk of project failure.

² Justin R. Pidot. The Bureau of Land Management’s Infirm Compensatory Mitigation Policy, 30 Fordham Envtl. Law Rev 1, 4 (2018) (article arguing against prior, Trump Administration, policy that disclaims statutory authority for BLM to impose compensatory mitigation); see also, Pidot, 61 B.C.L. Rev. at 1062.

- Site selection, service areas, scale-appropriate decision making, and appropriate actions and habitat types: Mitigation programs should provide guidance on appropriate criteria for selecting offset sites, including distance from impact site, boundaries within which impacts may be offset, and any requirements for identifying offset areas based on relevant scale-appropriate conservation information.
- Performance standards: Mitigation programs should have in place performance standards that are clear, science-based, measurable, and designed to track compliance, effectiveness, and inform any needed adjustments for improvement. They should also clearly specify the conservation outcomes that are expected.
- Durability: All mitigation measures should be designed such that conservation gains are durable.
- Duration: Measures should be designed to be in place at least as long as the duration of the direct and indirect impacts.
- Mitigation on Public Lands: BLM should employ the policy prescriptions and tools it has available to allow for compensatory mitigation on public lands. This includes legal measures such as easements or land designations using the authorities of the BLM to ensure the defensible, long-term conservation of any land identified as an offset.
- Additionality: Offsets should provide a new contribution to conservation, additional to what would have occurred without the offset.
- Equivalence: Compensatory mitigation measures should strive to deliver offsets that are “in kind” in terms of habitat type, functions, values, and other attributes.
- Monitoring and adaptive management: Monitoring and adaptive management are essential to ensure mitigation delivers the intended result.
- Certainty and transparency to regulators, developers and the public: Mitigation programs should strive to maximize consistency in implementation and provide predictability for project proponents, participating agencies, and mitigation providers.

B. *The mitigation measures included in the Willow MDP draft SEIS are wholly insufficient and in conflict with BLM policy.*

The SEIS contains no compensatory mitigation or evaluation of such mitigation measures based on reference to outdated policies. Specifically, the SEIS states:

Pursuant to BLM policy (IM No. 2019-018), BLM will not require compensatory mitigation, except where specifically required by law. However, BLM considers other compensatory mitigation programs applicable to the project and project area (e.g., voluntary or state-mandated compensatory mitigation), in its determination of mitigation for impacts from the Project, including USACE's

compensatory mitigation program under Section 404 of the CWA and the State's NPR-A Impact Grant Program.

This is surprising and deeply concerning. The BLM reinstated and updated its mitigation policies in 2021 in rightful recognition of the BLM's authorities to require mitigation. As the BLM states in IM 2021-046:

The Compensatory Mitigation IM (IM No. 2019-018) was found to be inconsistent with EO 13990 and SO 3398, and after careful review of IM 2019-018, the BLM determined that it unduly constrained the BLM's broad discretion to manage the public lands under FLPMA, and on July 12, 2021, IM 2019-018 was rescinded by IM 2021-038.

The BLM had more than sufficient time to develop and propose mitigation to account for the impacts of the alternatives detailed in the SEIS prior to its release. The SEIS as written is wholly out of compliance with the BLM's own laws, regulations and guidance, including IM 2021-046, Mitigation Manual (1794-M) and Mitigation Handbook (H-1794-1). Without effective mitigation to offset the tremendous impacts of the Willow Master Development Plan, the BLM will clearly be in violation of its own directive in FLPMA to avoid unnecessary and undue degradation.

The SEIS should be revised to include a full consideration of appropriate mitigation. At a minimum, this would include:

- The application of strict avoidance and minimization for special resources including the Teshekpuk Lake Special Area and habitat for special status avian species. We simply cannot reduce impacts to habitat where development occurs on rare and critical habitat.
 - In particular, the Special Conditions proposed in the SEIS for Spectacled and Steller's Eiders and Yellow-billed loon habitats are wholly insufficient. As experience with other avian species like the Greater sage-grouse has shown, minimal buffers (e.g. less than 1-mile) are insufficient to avoid impacts to habitat and disturbance of essential breeding behavior. Given the special status of the species in the project area, there is no circumstance in which waivers or modifications to the buffers on nests and habitat should be granted.
- A full evaluation of compensatory mitigation measures to offset the unavoidable impacts of this project on important habitat and other significant impacts consistent with standard mitigation principles as outlined above. Simply stated, impacts that cannot be avoided or minimized must be effectively mitigated through compensatory mitigation to achieve net conservation benefit. Compensatory mitigation must be durable, additional, developed based on the best available science, provide public transparency, and include monitoring and adaptive management.
- Mitigation measures to offset the significant, detrimental impacts of the greenhouse gas emissions generated by the proposed Willow Master Development Plan to the global climate. This is further detailed in a following section.

We thank the BLM for reinitiating consultation under the Endangered Species Act (ESA) concerning listed species, including polar bear. As the BLM website notes, “this consultation will include consideration of mitigation measures and updates to the range of alternatives.” This consultation will no doubt be a necessary component of the determination of how to address and offset the significant impacts of this project, including greenhouse gas impacts. Without sufficient mitigation, this project would clearly result in a jeopardy determination for the polar bear and other species facing the clear and present impacts of climate change.

C. By failing to consider compensatory mitigation, BLM is in violation of the National Environmental Policy Act, Federal Land Policy and Management Act, and Naval Petroleum Reserve Production Act.

NEPA requires that BLM must evaluate a reasonable range of alternatives.³ BLM’s own policies and guidance direct the agency to “consider mitigation well in advance of making decisions about anticipated public land uses by identifying opportunities for mitigation in mitigation strategies and incorporating mitigation into land use plans and programmatic or large geographic-scale NEPA analyses” (BLM H-1794-1 Mitigation Handbook). The Handbook goes on to state:

Through the NEPA analysis process, the BLM will, to the greatest extent possible, identify and consider the effectiveness of mitigation to address reasonably foreseeable impacts (both significant and non-significant) to resources (and their values, services, and/or functions) from proposed public land uses (BLM-proposed and externally proposed). The BLM will identify any required mitigation in the decision document(s) associated with the NEPA analysis and include any required mitigation in the land use authorization(s).

Mitigation should not be an afterthought; mitigation should be considered early and throughout the NEPA analysis process (e.g., scoping, proposed action, alternatives, environmental effects). For example, for BLM-proposed public land uses, the BLM should incorporate appropriate mitigation into the proposed project’s design as an integral component of the proposed action (i.e., project design features). Or, for externally proposed public land uses, the BLM should encourage applicants to propose appropriate mitigation for their public land use.

³ See, e.g., *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (“Forest Service failed to consider an adequate range of alternatives” when the “EIS considered only a no action alternative along with two virtually identical alternatives”); *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (holding that the Forest Service had unlawfully failed to consider an alternative to a timber program that would have provided greater protection for old-growth habitat); *Colorado Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1248 (D. Colo. 2012) (holding that BLM unlawfully failed to consider an alternative to oil and gas leasing that would have involved minimal surface disturbance); *Wilderness Soc. v. Wisely*, supra.

By failing to consider meaningful mitigation measures in its analysis of alternatives to the proposed action in the SEIS, it is clear that BLM is in violation of both its own policies and NEPA.

Failing to consider an alternative that would offset the impact of the Willow development on public lands and special resources also violates BLM's mandate to avoid unnecessary and undue degradation (UUD). BLM has defined its obligation to avoid UUD as requiring mitigation for adverse impacts.⁴ The IBLA and courts have recognized that BLM has authority to incorporate mitigation measures into project authorizations to prevent UUD.⁵

II. BLM must offset greenhouse gas emissions likely to result from the Willow Master Development Plan

As acknowledged by BLM in the draft SEIS, the best available scientific information demonstrates that GHG emissions are already at levels causing detrimental climate impacts to multiple uses on Federal public lands. To avoid the most catastrophic impacts of climate change, BLM cannot continue to lease and allow development of fossil fuels on public lands at current rates.⁶ Instead, the federal government and BLM should establish a carbon budget and a management framework that ensure net zero emissions from public lands are achieved. Because of the significant GHG emissions originating from Federal lands, BLM must do more than merely quantify the emissions in its decisions and, specifically, associated with the Willow Master Development Plan. Rather, it must fully account for those emissions and climate impacts, avoid or reduce emissions as much as possible, and fully mitigate any remaining emissions to ensure net zero GHG emissions. BLM has ample authority to do so and indeed must do so to satisfy its statutory obligations under FLPMA and the NPRPA.

First, under FLPMA, BLM is required to manage public lands “under principles of multiple use and sustained yield.”⁷ “Multiple use” means meeting “the present and future needs of the American people,” providing for “the long-term needs of future generations,” and ensuring the “harmonious and coordinated management of the various resources without permanent impairment of the

⁴ E.g., 43 C.F.R. §§ 3809.5 & 3809.420(a)(4) (explaining that, in the hard rock mining context, UUD means conditions, activities, or practices that are not “reasonably incident” to the mining operation or that fail to comply with other laws or standards of performance, which include “mitigation measures specified by BLM to protect public lands”)

⁵ See, e.g., *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76, 78 (D.C. Cir. 2011) (citing with approval *Biodiversity Conservation Alliance*, 174 IBLA 1, 5–6 (March 3, 2008), which held that an environmental impact may rise to the level of UUD if it results in “something more than the usual effects anticipated from development, subject to *appropriate mitigation*” (emphasis added)); *Biodiversity Conservation Alliance v. BLM*, No. 09-CV-08-J, 2010 U.S. Dist. LEXIS 62431, at *1, *27 (D. Wyo. June 10, 2010) (holding that infill drilling project would not result in UUD where BLM required enforceable mitigation of project impacts).

⁶ Dustin Mulvaney et al., *Over-Leased: How Production Horizons of Already Leased Federal Fossil Fuels Outlast Global Carbon Budgets* 5 (2016), https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wpcontent/uploads/wpallimport/files/archive/Over_Leased_Report_EcoShift.pdf.

⁷ 43 U.S.C. § 1732(a).

productivity of the land and the quality of the environment [considering] the relative values of the resources.”⁸ The concept of “sustained yield” must be consistent with the multiple use mandate.

Recognizing the environmental components of the multiple use mandate, courts have repeatedly held that public lands development is not required; instead, BLM must weigh development against other possible uses, including conservation to protect environmental values.⁹ Just as BLM can deny a project outright to protect the environmental uses of public lands, it can also condition a project’s approval on the commitment to mitigation measures that lessen environmental impacts.¹⁰

The multiple use framework’s emphasis on both protecting environmental resources and balancing the needs of present and future generations is highly relevant to consideration of climate change-related impacts and thus GHG emissions. Climate change will inevitably affect future generations more than present ones and threatens to deplete myriad resources—both renewable and non-renewable. Climate change is affecting and will continue to affect every other resource value included in the multiple use framework—whether environmental, recreational, or economic in nature—due to the drastic changes it is causing to the ecosystems of public lands and increased threats from natural disasters. Accordingly, satisfying FLPMA’s multiple use and sustained yield mandate requires BLM to ensure net zero emissions from the public lands it manages.

Second, mitigating climate impacts is required to satisfy BLM’s obligation to prevent “unnecessary or undue degradation” (UUD) under FLPMA.¹¹ Given the catastrophic impacts of climate change on public lands, multiple uses, and future generations, avoiding UUD requires BLM to ensure net zero carbon emissions from any leasing or development decision. It is never necessary to have a net incremental increase in GHG emissions, because any emissions can be fully mitigated and offset. In other words, a net zero carbon budget can readily be accomplished by not leasing, delaying leasing or development to account for option value or otherwise, or imposing mandatory measures to mitigate and offset any GHG emissions through proper stipulations or conditions of approval.

FLPMA’s broad policy directives support this approach. For instance, FLPMA calls on BLM to

⁸ Id. § 1702(c).

⁹ See, e.g., *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) (“BLM’s obligation to manage for multiple use does not mean that development *must* be allowed Development is a *possible* use, which BLM must weigh against other possible uses—including conservation to protect environmental values, which are best assessed through the NEPA process.” (emphasis in original)); *Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145, 1166 (D. Colo. 2018) (“[T]he principle of multiple use does not require BLM to prioritize development over other uses” (internal citations and quotation marks omitted)).

¹⁰ See, e.g., *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1300–01 (10th Cir. 1999) (“FLPMA unambiguously authorizes the Secretary to specify terms and conditions in livestock grazing permits in accordance with land use plans”); *Grynberg Petro*, 152 IBLA 300, 307–08 (2000) (describing how appellants challenging conditions of approval bear the burden of establishing that they are “unreasonable or not supported by the data”).

¹¹ 43 U.S.C. § 1732(b) (requiring BLM “[i]n managing the public lands . . . [to] take any action necessary to prevent unnecessary or undue degradation of the lands”); see also *Rocky Mountain Oil & Gas Ass’n v. Watt*, 696 F.2d 734, 739 (10th Cir. 1982) (“In general, the BLM is to prevent unnecessary or undue degradation of the public lands.”).

manage public lands “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air *and atmospheric*, water resource, and archaeological values.”¹² It also directs BLM to receive “fair market value” for the use of public lands.¹³ “Fair market value” is not defined in FLPMA, but BLM’s economic valuation handbook and previous working groups convened by the Department of the Interior indicate that “economic, environmental, and social considerations [should be considered] in determining the value of federal lands—including option value.”¹⁴ Because climate change caused by GHG emissions create costs to be borne by society at large and by BLM in adapting its lands to the changing climate, the “fair market value” of oil and gas extraction activities should take carbon costs into consideration and be addressed through mitigation, including compensatory mitigation.¹⁵

Choosing not to move forward with the Willow Master Development Plan or to mitigate GHG emissions from the project could be a significant part of the Federal government’s efforts to address climate change. But BLM stops short of requiring mitigation or even attempting to propose mitigation that might reduce GHG emissions. Such a decision is capricious. For this SEIS, BLM has not complied with its statutory obligations. This project cannot proceed absent full consideration and adoption of measures that would ensure net zero GHG emissions. Should the BLM choose to move forward with the Willow Master Development Plan, BLM must: fully and properly account for GHG emissions that cause climate impacts, along with fully and properly accounting for the climate impacts themselves; reduce emissions as much as possible, and thus contribute to reducing impacts; and fully mitigate and offset any remaining emissions (and therefore impacts) to ensure net zero GHG emissions as a condition of approval.

III. BLM must durably protect areas of ecological and cultural importance

As oil development has rapidly expanded in the region, the BLM has failed to comprehensively manage the lands and resources under its administration. BLM’s obligations extend beyond the analysis and approval of oil activities and includes comprehensive and science-based land management. The Reserve requires meaningful stewardship, and management actions have not kept pace with the rate of proposed and constructed oil developments.

¹² 43 U.S.C. § 1701(a)(8) (emphasis added).

¹³ Id. § 1701(a)(9).

¹⁴ See Exhibit 1, at 4 (2020) (citing Jayni Foley Hein, Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing, 42 Harv. Env’t. L. Rev. 1 at 39–40 (2018)); Bureau of Land Mgmt., H-3070-2 – Economic Evaluation of Oil and Gas Properties Handbook, at *3–4.

¹⁵ BLM may not rely on Instruction Memorandum 2019-018 to avoid its statutory obligations. See IM 2019-018, Compensatory Mitigation (Dec. 6, 2018). IM 2019-018 attempts to disallow mandatory offsite compensatory mitigation. IM 2019-018 itself recognizes BLM’s obligation under FLPMA to “refrain from authorizing any activity that causes . . . UUD.” Id. IM 2019-018 fails to distinguish between localized impacts and the global impacts of climate change or recognize that climate impacts are unlikely to be fully mitigated solely through onsite mitigation. Instead, it purports to forbid GHG offsets that would allow BLM to satisfy its obligations under FLPMA and the MLA to fully account for and mitigate climate change impacts. Reliance on IM 2019-018 is arbitrary, capricious, and not in accordance with law.

As we have seen over the last two decades, the protections for areas of conservation importance conveyed through Integrated Activity Plans are not durable. The meaningfulness and scope of Special Area protections and Best Management Practices/Required Operating Procedures has seesawed between presidential administrations. Meanwhile, oil developments that will have permanent and compounding impacts on the landscape have been authorized to move forward. The lack of certainty for conservation values presents unacceptable risks to globally significant ecosystems that are essential to the continuation of cultural practices.

Willow's westward expansion into the Reserve and incursion into the Teshekpuk Lake Special Area (TLSA) exemplifies the need for durable protections on areas of high conservation and cultural value. The Teshekpuk Caribou Herd is a culturally irreplaceable resource that depends on the Special Area for calving, post-calving, insect relief, and over-wintering habitat. Nuiqsut, Atkasuk, Utqiagvik, Wainwright, and Anaktuvuk Pass overwhelmingly rely on these animals as a subsistence resource. However, despite the growing impacts and risks of oil development within their range, BLM has taken no action to ensure the health and resilience of the core ecological areas that these animals depend on.

The best available conservation science says that ecosystems should remain unfragmented, large, and connected if they are going to be resilient in a climatically uncertain future.¹⁶ The Reserve's ecological integrity, and its ability to adapt to a rapidly changing Arctic, are dependent on these features. It is crucial for the continuation of abundant subsistence resources and irreplaceable cultural practices that BLM couple protective actions with any Willow approvals. If the lands and waters of the Reserve are not thoughtfully managed for resilience, fish and wildlife resources and associated traditional practices risk being compromised or outright lost.

A. Final Regional Mitigation Strategy for Northeast NPR-A

As part of the Greater Mooses Tooth-One (GMT-1) Record of Decision, BLM was required to complete a regional mitigation strategy for any oil projects enabled or assisted by the development's infrastructure.¹⁷ The Willow MDP is such a project.¹⁸ In August 2018, under the Trump Administration, the BLM completed the "Final Regional Mitigation Strategy (RMS) for Northeast NPR-A," a document finalized after an extensive public process.¹⁹ Within these materials, the government proactively laid out what residual effects from oil development can be anticipated and what actions should be taken to best manage the landscape and its resources for these impacts. The

¹⁶ See: Mawdsley JR, O'Malley R, Ojima DS. A review of climate-change adaptation strategies for wildlife management and biodiversity conservation. *Conserv Biol.* 2009 Oct;23(5):1080-9. doi: 10.1111/j.1523-1739.2009.01264.x. Epub 2009 Jun 22. PMID: 19549219.

¹⁷ See: Bureau of Land Management, Final Regional Mitigation Strategy for Northeastern NPR-A, August, 2018. Available at: https://www.blm.gov/sites/blm.gov/files/uploads/Planning_Alaska_FINAL_NPR-A_RMS.pdf, at page 39.

¹⁸ In approving the Greater Mooses Tooth Two (GMT-2) development, which extended directly from GMT-1, the BLM failed to follow their own policy and did not utilize the RMS.

¹⁹ See: Bureau of Land Management, Final Regional Mitigation Strategy for Northeastern NPR-A, August, 2018. Available at: https://www.blm.gov/sites/blm.gov/files/uploads/Planning_Alaska_FINAL_NPR-A_RMS.pdf

RMS also identified a series of mitigation actions, mitigation projects, and mitigation locations to best manage impacts.

The following content was included with the RMS on page 16 as potential mitigation projects and project locations:

- Residual impacts: subsistence, socio-cultural systems, air quality, water quality, public health, birds, fish, terrestrial mammals, and species of conservation concern
- Mitigation actions: preserve and protect areas with important environmental, subsistence, or cultural resource values, including high-value wetlands
- Potential mitigation projects: establish conservation easements
- Potential project locations: Fish Creek, Judy Creek, Tinimiasigvik (Ublutuoq) River, Colville River Delta/Special Area, Colville River Watershed, and Teshekpuk Lake Special Area and vicinity

These residual impacts are consistent with what is articulated in the Willow draft SEIS. To mitigate the impacts of Willow, we believe easement authority should be operationalized to protect large areas of subsistence importance and conservation value. The use of conservation easements is a necessary component of any compensatory mitigation because of the certainty and durability it provides for the sustained protection of core ecological areas within the region.

Generally, we believe the terms and conditions of these easements should be to ensure that identified lands remain in their natural state, free from all oil and gas activities, and available for subsistence resources and practices for future generations. Easements should be held by a viable and experienced third party, such as a land trust or community foundation. Additionally, as part of these protections, BLM should consider developing the initial, basic architecture of a community-based stewardship and monitoring program for interested entities, such as tribal governments and/or other interested organizations. Such guardianship opportunities would help diversify the regional economy beyond just oil development. A stewardship endowment, funded by the project applicant, federal government, and/or third party, should accompany the stewardship program. Such a financial structure will help to ensure the program's viability and the effectiveness of stewardship activities into the future.

B. Easement Authority

BLM has the authority under the Federal Land Policy and Management Act (FLPMA) to "regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use occupancy, and development of public lands."²⁰ BLM also has the authority under FLPMA to enter into contracts and cooperative agreements involving the management and protection of public lands.²¹ Moreover, the National Petroleum Reserve

²⁰ FLPMA § 302, 43 U.S.C. § 1732(b); FLPMA § 501, 43 U.S.C. § 1761(a) (providing BLM's general authority to grant rights-of-way).

²¹ FLPMA § 307, 43 U.S.C. § 1737(b).

Production Act (NPRPA) gives the BLM broad authority to protect subsistence, habitat, wildlife, and other values of the Reserve.²²

IV. BLM must fully assess and address its obligations to protect migratory birds under the Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) is essentially designed to protect birds from people. For almost 100 years, the MBTA has held entities responsible for “incidental take,” where deaths may occur as a result of otherwise lawful activities. The MBTA provides a critical tool for accountability through enforcement of the law by issuing penalties in egregious cases and providing a key incentive to implement practices to avoid harm to migratory birds in the first place, which has led to the development and adoption of best practices to protect birds.

On October 4, 2021, the US Fish and Wildlife Service published a final rule revoking a prior regulation from January 7, 2021 that limited the scope of the MBTA. This prior rule and associated DOI Solicitor’s opinion from 2017 took the radical position that only actions intended to kill birds could be subject to the MBTA. With this final and formal revocation of the prior rule, the Service returned to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and long-standing practice prior to 2017.²³ Despite the fact that the final rule went into effect on December 3, 2021, and despite prior long-standing precedent, the SEIS seems to be woefully inadequate in its analysis of migratory birds and the BLM’s responsibilities to protect migratory birds under MBTA.

The area provides important habitat for a wide range of migratory birds, many of which have been identified by federal and state agencies as requiring protection. Audubon’s Migration Explorer suggests that 92 bird species migrate to the area, traveling from Alaska to 19 countries across the

²² See, e.g., 42 U.S.C. § 6502 (“[The] Secretary is authorized to . . . make such dispositions of mineral materials and grant such rights-of-way, licenses, and permits as may be necessary to carry out his responsibilities under this Act.”); *id.* § 6506(a) (“Activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska.”); see also 43 C.F.R. § 2361.1(c) (“Maximum protection measures shall be taken on all actions within the Utikok River Uplands, Colville River, and Teshekpuk Lake special areas, and any other special areas identified by the Secretary as having significant subsistence, recreational, fish and wildlife, or historical or scenic value.”); 43 C.F.R. § 2361.1(e)(1) (“To the extent consistent with the requirements of the Act and after consultation with appropriate Federal, State, and local agencies and Native organizations, the authorized officer may limit, restrict, or prohibit use of and access to lands within the Reserve, including special areas. On proper notice as determined by the authorized officer, such actions may be taken to protect fish and wildlife breeding, nesting, spawning, lambing or calving activity, major migrations of fish and wildlife, and other environmental, scenic, or historic values.”).

²³ US Fish and Wildlife Service. Governing the take of migratory birds under the Migratory Bird Treaty Act. <https://www.fws.gov/regulations/mbta>

Western hemisphere (see list, Appendix A).²⁴ The Willow Master Development Plan SEIS acknowledges:

*Between 80 and 90 bird species may occur in the analysis area and nearshore waters of the Beaufort Sea (BLM 2004a, 2012b); approximately 50 species regularly occur or are common (Appendix E.11, Birds Technical Appendix). Ground-nesting shorebirds are the most abundant breeding birds (in terms of number of species and number of breeding individuals) followed by passerines, waterfowl, loons, seabirds, ptarmigan, and raptors. **Nearly all species are seasonal migrants** using the ACP during the breeding season. The exceptions are rock and willow ptarmigan, gyrfalcon, snowy owl, and common raven, which can be year-round residents (Johnson and Herter 1989). [emphasis added]*

Despite this acknowledgement of the number of migratory bird species that use the area, the SEIS includes no mention of the BLM's obligations to protect these migratory birds under the MBTA. The SEIS also includes no mention of any consultation that has taken place with the US Fish and Wildlife Service to evaluate the BLM's responsibilities under MBTA. While the SEIS includes considerations for special status species, it seemingly ignores the full suite of migratory birds that use this area for essential breeding and nesting grounds, as well as their protected status under MBTA.

The BLM should have considered an alternative that protects migratory bird species, developed in close coordination with regional, state, and federal wildlife agencies. No such alternative is evaluated in the SEIS. It is standard practice for BLM to evaluate the impacts of oil and gas projects on migratory birds and to propose mitigation measures such as changing the timing of drilling and operations to minimize impacts on migratory birds. It is also standard practice for the BLM to develop a Migratory Bird Conservation Plan for such projects in consultation with the US Fish and Wildlife Service. Yet the SEIS includes no such measures or plans.

Here, BLM did not consider a reasonable range of alternatives because the agency did not evaluate an option including protections for migratory birds and a Migratory Bird Conservation Plan (MBCP), and did not "rigorously explore and objectively evaluate"²⁵ the MBCP option in its SEIS in order to make an informed decision and facilitate public understanding. The BLM must evaluate an alternative that rigorously explores and evaluates the MBCP option (and actually reviews a draft of the MBCP and its potential impacts), provides for robust and ongoing consultation with state and federal wildlife agencies, and establishes a decision-making framework for migratory birds. Until the BLM has done so, it has not analyzed a reasonable range of alternatives and is in violation of NEPA.

²⁴ Bird Migration Explorer (Smith et al. 2022). Smith, M. A., J. Mahoney, E. Knight, L. Taylor, N. Seavy, C. Bailey, M. Carbone, W. DeLuca, N. Gonzalez, M. Jimenez, G. O'Bryan, N. Rao, C. Witko, C. Wilsey, and J. L. Deppe. 2022. Bird Migration Explorer. National Audubon Society, New York, NY.

²⁵ 40 CFR § 1502.14(a)

The same inadequacies apply to the SEIS's consideration – or lack thereof – with regard to eagles and obligations under the Bald and Golden Eagle Protection Act (BGEPA).²⁶ Despite noting the potential presence of golden eagles in the area (our information suggests bald eagles may be present as well) - and acknowledging that eagles may be electrocuted on powerlines – the SEIS seems to include no detailed assessment, protections, or mitigation measures to address the potential for take of eagles or to comply with BLM's obligations under BGEPA.

Today, the stakes for birds have never been higher. Scientists estimate that North America is home to nearly three billion fewer birds today compared to 1970, a loss of more than one in four in a mere fifty years.²⁷ In addition, Audubon has determined that two-thirds of birds are at risk of extinction due to climate change.²⁸ For the sake of the planet's climate, globally important birds and habitats, and culturally irreplaceable resources, we are hopeful that Department of the Interior and the Bureau of Land Management will rise to the tremendous challenge that Willow presents. Thank you for considering these comments. Please be in touch if you have any questions or would like to discuss these ideas in greater detail.

Sincerely,

David R. Krause
Interim Executive Director & Vice President
Director of Conservation
Audubon Alaska

Christopher Simmons
Senior Manager, Public Lands Policy
National Audubon Society

Sara Brodnax
Director, Public Lands Policy
National Audubon Society

cc: Steve Cohn
Tracy Stone-Manning

²⁶ (16 U.S.C. 668-668d).

²⁷ Decline of the North American Avifauna, Rosenberg, et al., available at <https://science.sciencemag.org/content/366/6461/120>.

²⁸ Survival by Degrees, available at <https://www.audubon.org/climate/survivalbydegrees>.

Appendix A. Migratory bird species that occur in the local area at some time throughout the year, based on data from the Bird Migration Explorer²⁹

Alder Flycatcher
American Pipit
American Robin
American Wigeon
American Golden-Plover
American Tree Sparrow
Arctic Tern
Baird's Sandpiper
Bank Swallow
Black-bellied Plover
Blackpoll Warbler
Brant
Buff-breasted Sandpiper
Cackling Goose
Canada Goose
Cliff Swallow
Common Eider
Common Loon
Common Redpoll
Dunlin
Fox Sparrow
Glaucous Gull
Green-winged Teal
Golden-crowned Sparrow
Golden Eagle
Greater Scaup
Greater White-fronted Goose
Gray-cheeked Thrush
Gyr Falcon
Herring Gull
Horned Lark
King Eider
Lapland Longspur
Least Sandpiper
Lesser Yellowlegs
Long-billed Dowitcher
Long-tailed Duck
Long-tailed Jaeger

²⁹ Bird Migration Explorer (Smith et al. 2022). Smith, M. A., J. Mahoney, E. Knight, L. Taylor, N. Seavy, C. Bailey, M. Carbone, W. DeLuca, N. Gonzalez, M. Jimenez, G. O'Bryan, N. Rao, C. Witko, C. Wilsey, and J. L. Deppe. 2022. Bird Migration Explorer. National Audubon Society, New York, NY.

Mallard
Merlin
Short-billed Gull
Northern Harrier
Northern Pintail
Northern Shoveler
Northern Shrike
Orange-crowned Warbler
Pacific Loon
Parasitic Jaeger
Pectoral Sandpiper
Peregrine Falcon
Pomarine Jaeger
Red-breasted Merganser
Red Phalarope
Red-necked Phalarope
Red-throated Loon
Rough-legged Hawk
Ruddy Turnstone
Sabine's Gull
Sandhill Crane
Sanderling
Savannah Sparrow
Semipalmated Plover
Semipalmated Sandpiper
Short-eared Owl
Snow Bunting
Snow Goose
Snowy Owl
Spectacled Eider
Spotted Sandpiper
Steller's Eider
Stilt Sandpiper
Surf Scoter
Tree Swallow
Tundra Swan
Western Sandpiper
White-crowned Sparrow
Whimbrel
White-rumped Sandpiper
Wilson's Snipe
Wilson's Warbler
Yellow-billed Loon
Yellow Warbler
Yellow-rumped Warbler